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No. 88-389

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO,
Appellant,

v.

JUNE M. BETTS,
Appellee.

On Appeal from the
United States Court of Appeals
for the Sixth Circuit

BRIEF FOR THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS AS AMICUS CURIAE SUPPORTING APPELLANT

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QUESTION PRESENTED

Whether a retirement program's denial of disability retirement benefits to employees age 60 and over (and provision instead of only early or regular retirement benefits) must be justified by age-related cost factors in order to qualify for protection under the "bona fide employee benefit plan" exemption of § 4(f)(2) of the Age Discrimination In Employment Act of 1967, 29 U.S.C. § 623(f)(2).

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Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcommittee on Labor of the House Committee on Education and Labor, 90th Cong., 1st Sess. (Aug. 1, 2, 3, 15, 16 and 17, 1967)	18, 19
Age Discrimination in Employment: Hearings on S.830 and S.788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. (March 15-17, 1967)	15, 16, 17, 18
The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in EEOC Legislative History*, at 16	13, 14, 21, 22
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113 Cong. Rec. 7076 (March 16, 1967), *reprinted in EEOC Legislative History*, at 71	17, 21
113 Cong. Rec. 7077 (March 16, 1967), *reprinted in EEOC Legislative History*, at 72	17
113 Cong. Rec. 31253-31257 (Nov. 6, 1967), *reprinted in EEOC Legislative History*, at 144-48	21
113 Cong. Rec. 31255 (Nov. 6, 1967), *reprinted in EEOC Legislative History*, at 146	20, 21
113 Cong. Rec. 34740 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 151	21-22
113 Cong. Rec. 34745 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 156	20
113 Cong. Rec. 34750 (Dec. 4, 1967), *reprinted in EEOC Legislative History*, at 161	20

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Basic Patterns, Collective Bargaining Negotiations and Contracts (BNA) No. 1068 (May 8, 1986)	24
Fundamentals of Employee Benefit Programs (Employee Benefit Research Institute, 3d ed. 1987)	9, 24
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M. Wermel & G. Beideman, *Employee Benefit Programs* (1957)	10
Retirement Before Age 65: Trends, Costs, and National Issues, U.S. General Accounting Office (July 1986)	24
Successful Employee Benefit Plans (Prentice-Hall, Inc. ed. 1952)	10
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INTEREST OF THE AMICUS[1]

The Association of Private Pension and Welfare Plans ("APPWP") is a nonprofit organization founded in 1967 to protect and foster the growth of this country's private employer-sponsored employee benefit system. The over 400 members of the APPWP include many large and small plan sponsors, as well as plan support organizations, such as investment firms, banks, insurers, actuar-

[1] Counsel for both parties have consented to the filing of this amicus brief. Their consents have been filed with the Clerk of this Court.

ial firms, and other professional benefit organizations. Collectively, the APPWP's members have substantial experience in the design and administration of benefit plans of all types, including retirement plans—like the one at issue here—that limit eligibility for disability benefits to those (younger) persons who are ineligible for regular or early retirement benefits. Thus, the resolution of the issue presented in this case—involving whether a retirement program's denial of disability retirement benefits (but not early or regular retirement benefits) to employees age 60 and over must be justified by age-related cost factors in order to qualify for protection under § 4(f)(2) of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 623(f)(2)—is of significant interest to APPWP and its members.

STATEMENT

The Public Employees Retirement System of Ohio ("PERS") entitles public employees who satisfy certain eligibility conditions to receive monthly retirement benefits upon the termination of their employment. J.S. App. A3, A9. A regular retirement pension is available to any employee who has attained the age of 70; an early retirement pension is available to any employee who is age 60 or over and has five or more years of service. J.S. App. A31-A32. A disability retirement pension is available to any employee who has at least five years of credited service and has become physically unable to perform the requirements of her job. J.S. App. A3, A9. An employee is ineligible for the disability retirement pension, however, if she is age 60 or over, or is receiving another disability retirement benefit from any Ohio state or municipal program. J.S. App. A9. The statutory age limitation on receipt of disability retirement benefits under PERS has existed since 1933. J.S. App. A3. In 1976, Ohio amended the statute to provide that the disability pension would equal or exceed 30% of an employee's final average salary. J.S. App. A24.

In June 1985, June Betts, a 61-year-old employee of the Hamilton County Board of Mental Retardation and Developmental Disabilities ("HCBMRDD"), became disabled and could no longer perform her work-related duties. J.S. App. A21, A23. HCBMRDD advised Betts that, unless she elected regular retirement, it would be forced to place her on unpaid medical leave. J.S. App. A23. Betts applied to PERS for the more valuable disability retirement benefits,[2] but PERS told her that she was ineligible for those benefits because of her age. *Ibid.* Betts then elected both to receive early retirement benefits (plus health benefits) and to file suit under the ADEA, claiming that the State had compelled her to retire by denying her disability retirement benefits. *Ibid.*

On cross-motions for summary judgment, the district court held for Betts. J.S. App. A20-A34. Although it agreed that the plan was "eminently just" since it provided benefits to persons who would "otherwise have no source of income during their disability," it found that the plan discriminated against older workers on the basis of age. J.S. App. A25-A26. Moreover, it rejected PERS' argument that the "bona fide employee benefit plan" exemption in § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2), protected the disability retirement provision, finding that the age limitation on eligibility for disability retirement benefits was not justified by significant age-related cost considerations and, therefore, that the program was not the "type of plan" contemplated in the exemption. J.S. App. A29. The court went on to hold that, by limiting Betts to a choice between regular retirement and unpaid medical leave, HCBMRDD and PERS had constructively discharged, and thus involuntarily retired, her in

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[2] Because it had to equal at least 30% of Betts' final average salary, the disability retirement benefit for Betts would have equalled $355.02 per month. The early retirement benefit, which included no minimum benefit guarantee, equalled only $158.50 per month. J.S. App. A24.

violation of § 4(f)(2)'s express prohibition. J.S. App. A30.

A divided panel of the Sixth Circuit affirmed. J.S. App. A2-A19. It began by noting that, under § 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), an employer "may not use age as a basis on which to discriminate against an employee in the compensation, terms, conditions, or privileges of employment." *Id.* at A4. It further noted that, "[w]hen there is direct evidence that a benefit plan discriminates on the basis of age, the plan is unlawful unless it falls within the bona fide employee benefit plan exception of 29 U.S.C. § 623(f)(2)" and that, in amending this exception in 1978, "Congress expressly repudiated [this] Court's decision and reasoning in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), which held that a bona fide benefit plan that treated older employees differently and predated the Act need not be justified by any business purpose." J.S. App. A4. The court then concluded that, "[i]n light of this legislative intent," it had to "agree" with the district court that " 'the critical factor in [the] determination of whether defendants' plan is the type of plan exempted is whether it is based upon age-related cost factors' " (*ibid.* (citation omitted)).

Citing federal regulations and two courts of appeals' decisions, the court explained that "[u]nder the Act, an age-based benefit plan which denies disability retirement to older employees in favor of forcing length of service retirement is unlawful unless it can be justified by a substantial business purpose." J.S. App. A5. It then found that the plan could not be justified by any such business purpose because, "[d]espite having every opportunity, the defendants declined to introduce any cost figures or other economic justification." J.S. App. A6. Thus, without addressing the district court's constructive discharge and involuntary retirement findings, the court of appeals affirmed.

SUMMARY OF ARGUMENT

The court below held that, in order to qualify for the exemption of § 4(f)(2) of the ADEA, an age-based variance in employee benefits must be justified by age-related cost considerations. In so holding, the court concluded (1) that, in amending the ADEA in 1978 to prohibit involuntary retirements, Congress repudiated this Court's decision in *McMann* that an employee benefit plan that predates the ADEA cannot be a "subterfuge" to evade the statute's purposes and (2) that therefore only benefit variances justified by age-related costs are protected by § 4(f)(2). The APPWP does not purport to address, and leaves to the Appellant and its other *amici* the task of explaining, how the 1978 amendment affects the *McMann* decision and the age-related cost justification theory. Rather, the APPWP addresses here only Congress' original intent, and the purposes it sought to achieve, in enacting the § 4(f)(2) exemption.

The age-related cost justification limitation which the court below imposed on § 4(f)(2) of the ADEA is without support in either the plain language or the legislative history and purpose of the statute. By its terms, § 4(f)(2) broadly exempts from the ADEA's proscriptions "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the statute's purposes." 29 U.S.C. § 623(f)(2). It thus shields any and all ongoing administrative programs for the provision of non-wage and non-salary compensation that are not designed to accomplish discrimination in the terms and conditions of employment or in compensation not conferred through an employee benefit plan.

Neither the "such as" phrase that modifies "any bona fide employee benefit plan" nor the "subterfuge" phrase suggests, much less compels, a different conclusion. The former merely denotes examples of employee benefit

plans that § 4(f)(2) protects. The latter, by requiring inquiry into the employer's subjective intent, ensures that employers cannot design and use benefit plans to engage in otherwise prohibited acts of discrimination against older workers.

Nothing in the ADEA's legislative history permits a more restrictive reading of § 4(f)(2). That history demonstrates that, in enacting the ADEA, Congress was principally concerned with promoting employment of older workers and with eliminating "arbitrary" age discrimination. Although Congress recognized that "institutional barriers," including employee benefit plans, were among the causes of unemployment of older workers, it declined to equate these institutional barriers with "arbitrary" age discrimination and, moreover, determined that disruption of employee benefit plans would only exacerbate the unemployment problem. It thus enacted the broad exemption for employee benefit plans that Senator Javits proposed—instead of the narrower one proposed by Senator Smathers that would have limited the exemption to plans with age-related cost justifications—to encourage the hiring of older workers by not disrupting the employee benefit system. Congress did so recognizing that the age-related cost of providing employee benefits was only one of several plan-related causes of the unemployment problem and, furthermore, that the language it used would apply to many plans which lacked such age-related cost justifications.

The age-related cost justification limitation on § 4(f)(2) simply would not advance the statute's overall purposes as well as a broader exemption would. In enacting the ADEA, Congress was concerned with: (1) "arbitrary" discrimination aimed at involuntary limiting employment of older workers; (2) "institutional barriers" that operated to deter employment of older workers; and (3) encouraging employers, employees and unions to develop solutions to the special needs of older workers.

While the age-related cost justification theory responds in part to the first of these concerns when plans are claimed to cause the termination of older workers, it is entirely insensitive to the latter concerns. It treats the age-related costs of providing employee benefits as the sole "institutional barrier" to the employment of older workers, despite Congress' recognition that other plan-related barriers exist. And the age-related cost justification limitation is insensitive to the special problems arising from the impact of age on employment. Its adoption would, therefore, undermine the purposes of § 4(f)(2) by disrupting well-established employee benefit plans—many of which contain no age-related cost factors—and by making plan design and benefit negotiations inflexible and unresponsive to the special needs of older workers. Such results disregard the very concerns that motivated Congress to enact § 4(f)(2) in 1967.

ARGUMENT

NEITHER THE LANGUAGE OF THE "BONA FIDE EMPLOYEE BENEFIT PLAN" EXEMPTION IN § 4(f)(2) OF THE ADEA NOR ITS LEGISLATIVE HISTORY AND PURPOSE SUPPORT THE CONCLUSION THAT AGE-BASED VARIANCES IN EMPLOYEE BENEFITS MUST BE JUSTIFIED BY AGE-RELATED COST FACTORS

The court below held that the State of Ohio's retirement program, which denies disability retirement benefits to workers age 60 and over, does not qualify for protection under § 4(f)(2) of the ADEA because its age-based variance in employee benefits was not justified by age-related cost considerations. In so holding, the court ruled either that § 4(f)(2) applies only to those types of "plans" where the cost of providing a benefit varies according to age, or that an age-based differential in benefits is a "subterfuge" to evade the purposes of the ADEA unless the differentiation is specifically attributable to age-related costs. But neither conclusion—both of which

engraft an age-related cost justification limitation onto § 4(f)(2)—can be squared with the language, legislative history, or purposes of the ADEA.

A. The Statutory Language Does Not Support An Age-Related Cost Justification Limitation On § 4(f)(2)

This Court has often stated that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *see also INS v. Phinpathya*, 464 U.S. 183, 189 (1984); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982). The language of the ADEA makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." ADEA § 4(a)(1), 29 U.S.C. § 623(a)(1). But § 4(f)(2) of the statute qualifies § 4(a)(1)'s prohibition, making it entirely lawful for an employer "to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter. . . ." 29 U.S.C. § 623(f)(2).[3] The "ordinary, contemporary, common meaning" (*Perrin v. United States*, 444 U.S. 37, 42 (1979)) of these words requires the conclusion that § 4(f)(2) protects all ongoing administrative programs that provide non-wage compensation—even those without age-related cost justifications—that were not conceived to accomplish discrimination in terms or conditions of employment or in compensation not conferred by employee benefit plans.

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[3] In 1978, Congress amended § 4(f)(2) to add a proviso which states that "no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual[.]" 29 U.S.C. § 623(f)(2). The effect of this amendment on the exemption is discussed briefly *infra* at n.5, and more extensively in the briefs of Appellant and the Commonwealth of Pennsylvania as *amicus curiae*.

By its terms, § 4(f)(2) applies to "any bona fide employee benefit plan." 29 U.S.C. § 623(f)(2). The term "any" signifies that Congress intended the exemption to be comprehensive in scope. *See, e.g., Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 588-89 (1980); *Shea v. Vialpando*, 416 U.S. 251, 260 (1974). The phrase "bona fide" means only that a plan must be authentic—that is, it must "'exist[] and pay[] benefits.'" *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 194 (1977) (citation omitted). The phrase "employee benefit" refers to "virtually any form of compensation provided: (1) in a form other than direct wages; and (2) paid for in whole or in part by the employer." *Fundamentals of Employee Benefit Programs* 2 (Employee Benefit Research Institute, 3d ed. 1987); *see also Websters II-Riverside University Dictionary* 115 (1984). Finally, the term "plan" refers to any "detailed scheme, program, or method worked out beforehand for the accomplishment of an object." *Id.* at 898; *see also Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. 2211, 2217-219 (1987) (defining term "plan" in Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*). Thus, when viewed in terms of its ordinary meaning, the language of § 4(f)(2) exempts every ongoing administrative program that provides non-wage compensation to employees, provided that the program is not a "subterfuge" to evade the purposes of the ADEA.[4]

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[4] This interpretation draws support from the meaning given to the phrase "employee benefit plan" in the industrial relations practice that pre-existed the ADEA's enactment in 1967 and that continues to exist today. *Cf. California Brewers Ass'n v. Bryant*, 444 U.S. 598, 604 (1980) (interpreting the term "seniority system" in Title VII by reference to industrial relations practice and traditional labor policy). In that practice, the phrase "employee benefit plan" was and is understood to refer to a broad range of plans, including, *inter alia*, short- and long-term disability benefit plans, disability retirement plans, insurance plans, disability insurance plans, pension plans, profit-sharing plans, savings plans, scholarship plans, stock purchase plans, termination incentive and severance

That Congress modified the phrase "any bona fide employee benefit plan" with the phrase "such as a retirement, pension, or insurance plan" does not, as some courts have suggested, provide support for an age-related cost justification limitation on § 4(f)(2)'s plain meaning. *See, e.g., EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211, 224 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984). When Congress enacted the ADEA, many retirement, pension, or insurance plans—such as defined contribution pension plans, profit-sharing retirement plans, and some disability retirement plans—did not have age-related cost justifications. The age-related cost-justification limitation, therefore, cannot be derived from the "types" of plans listed in the "such as" phrase. *Accord Alford v. City of Lubbock*, 664 F.2d 1263 (5th Cir.), *cert. denied*, 456 U.S. 975 (1982) (defined contribution pension plan); *Brennan v. Taft Broadcasting Co.*, 500 F.2d 212 (5th Cir. 1974) (profit-sharing retirement plan). Moreover, the "such as" phrase merely provides examples of the plans included in the phrase "any bona fide employee benefit plan." It does not purport to define or qualify that phrase, as an age-related cost justification limitation would do. *See id.* at 215; *see generally Donovan v. Anheuser-Busch, Inc.*, 666 F.2d 315, 327 (8th Cir. 1981). Finally, the "such as" phrase purports only to illustrate the kinds of "plans" that § 4(f)(2) covers, and the concept of a *plan* does not in any sense relate to the variables affecting the cost of providing

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allowace plans, and certain vacation, sick leave, and holiday plans. *See The Total Approach to Employee Benefits* 83-124, 506 (A. Deric ed. 1967); M. Greene, *The Role of Employee Benefit Structures in Manufacturing Industry* 13, 20-23, 103-110 (1964); M. Wermel & G. Beideman, *Employee Benefit Programs* 1-4, 17-19, 23-21 (1957); *Successful Employee Benefit Plans* 74-91 (Prentice-Hall, Inc. ed. 1952). *Accord* 29 C.F.R. § 1625.10(2)(b) (1979) ("[a]n 'employee benefit plan' is a plan, such as a retirement, pension, or insurance plan, which provides employees with what are frequently referred to as 'fringe benefits'").

particular *benefits*. *See Brennan v. Taft Broadcasting Co.*, 500 F.2d at 216-217; *see generally Fort Halifax Packing Co. v. Coyne*, 107 S. Ct. at 2217-219 (discussing significance of distinction between statutory terms "plans" and "benefits").

Nor does the "subterfuge" language provide a basis for engrafting an age-related cost justification limitation onto § 4(f)(2). "In ordinary parlance, and in dictionary definitions as well, a subterfuge is a scheme, plan, stratagem, or artifice of evasion." *United Air Lines, Inc. v. McMann*, 434 U.S. at 203. The "subterfuge" language thus refers to a specific "intent . . . to evade a statutory requirement," and is inconsistent with any "*per se* rule requiring an employer to show an economic or business purpose" in order to qualify for the § 4(f)(2) exemption. *Ibid.* A *per se* age-related cost justification limitation is even more at odds with the "subterfuge" language than is a *per se* economic or business purpose requirement: by making the "subterfuge" inquiry turn on a particular kind of objective proof, as the decision below apparently does, it essentially removes the illicit subjective intent requirement from the statute. *Cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The "subterfuge" language cannot properly be interpreted in this fashion. *Accord EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1494-1495 (3d Cir. 1988) (Hutchinson, J., concurring); *Germann v. Levy*, 553 F. Supp. 700, 703 n.9 (N.D. Ill. 1982).[5]

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[5] The court below suggested that, in amending the ADEA in 1978, Congress overruled the *McMann* Court's interpretation of the "subterfuge" clause. J.S. App. A4. But Congress did not modify or redefine the "subterfuge" language in response to *McMann*; it simply amended the statute to prohibit involuntary retirement. Moreover, as both Appellant and the Commonwealth of Pennsylvania as *amicus curiae* explain (App. Br. ——; Penn. Br. ——), while the legislative history indicates that Congress disagreed with the *McMann* decision, its focus was entirely on the lawfulness of involuntary retirement provisions—and not on the application of the

This is not to say that all benefit programs that vary non-payroll compensation items on the basis of age—including those without age-related cost justifications—are necessarily lawful under the ADEA. The "subterfuge" language plainly precludes such a result: it denies protection to those plans which an employer has designed and used specifically to discriminate against older workers with respect to either their terms and conditions of employment or their compensation that is not conferred through an employee benefit plan. *See United Air Lines, Inc. v. McMann*, 434 U.S. at 207 (White, J., concurring); *Patterson v. Independent School District #709*, 742 F.2d 465, 466 (8th Cir. 1984). Thus, the exemption would not protect a plan that an employer specifically designed to force the involuntary retirement of older persons. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 124-125 (1985). Nor would the exemption protect a plan that an employer specifically conceived to continue what previously had been a discriminatory payroll practice. *Cf. EEOC v. Home Insurance Co.*, 672 F.2d 252, 257-263 (2d Cir. 1982). But where there is no proof of an intent to evade a statutory prohibition—as, for example, where a challenged benefit provision pre-dates the ADEA's enactment (*see United Air Lines, Inc. v. McMann*, 434 U.S. at 203); where an age-based benefit distinction has an economic or business purpose (*see, e.g., Potenze v. New York Shipping Ass'n*, 804 F.2d 235, 238-239 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 1955 (1987); *Crosland v. Charlotte Eye, Ear & Throat Hosp.*, 686 F.2d 208, 212-216 (4th Cir. 1982); or where a voluntary incentive plan provides em-

"subterfuge" clause to other plan provisions. In these circumstances, Congress cannot be deemed to have overruled the *McMann* majority's interpretation of the "subterfuge" clause. *Accord EEOC v. Cargill, Inc.*, 855 F.2d 682, 686 (10th Cir. 1988); *EEOC v. County of Orange*, 837 F.2d 420, 422 (9th Cir. 1988). And, even if Congress can be deemed to have overruled this aspect of the *McMann* decision, there is still no basis for importing an age-related cost justification limitation into the "subterfuge" inquiry.

ployees options that they are free to reject (*see, e.g., Patterson v. Independent School District #709*, 742 F.2d 465)—the variance in benefits under the plan would constitute nothing more than the discrimination that § 4(f)(2) expressly permits.

B. An Age-Related Cost Justification Limitation Is Inconsistent With The Legislative History Of The § 4(f)(2) Exemption

The conclusion that § 4(f)(2) protects all ongoing administrative programs that vary benefits on the basis of age and are not a subterfuge to evade the ADEA's purposes—regardless of whether they reflect age-related cost justifications—is fully supported by the statute's legislative history. The contrary suggestion of the court below is unfounded.

The ADEA's legislative history demonstrates that promoting the employment of older workers was Congress' principal concern when it enacted the statute in 1967. In 1964, when it first began to consider the age discrimination problem, Congress ordered the Secretary of Labor to "make a full and complete study of the factors which might tend to result in discrimination in employment because of age" and to make recommendations to Congress for legislation to prevent "arbitrary" age discrimination in employment. 42 U.S.C. § 2000e-14 (repealed). The Secretary of Labor did so. *See The Older American Worker: Age Discrimination in Employment, Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964* (1965) ("*Secretary's Report*"), *reprinted in EEOC Legislative History of the Age Discrimination in Employment Act of 1967*, at 16-41 (1981) ("*EEOC Legislative History*"). His June 1965 Report found that "not all discrimination in this area is 'arbitrary'"; that age discrimination (unlike other forms of discrimination) is rarely based on a mere dislike for older workers; and that age discrimination is principally based on (a) unfounded assumptions about the effect of age on ability to perform, (b) valid conclusions

about the effect of age on ability to do a job, and (c) institutional arrangements—such as pension, seniority, insurance, and promotion-from-within policies—that, although often designed to protect or support older workers, may have an adverse impact on their employment. *EEOC Legislative History* at 19-20. Importantly, the Report made clear that only decisions based on unfounded assumptions about the effect of age on ability constitute "arbitrary age discrimination." *Id.* at 20. The Report added that, in isolated circumstances, employers could use institutional arrangements arbitrarily to restrict the employment opportunities of older workers. *Id.* at 22.

While the Report characterized employee benefit plans as "institutional arrangements" which might adversely affect the employment of older workers (*EEOC Legislative History*, at 33), it also stressed that "[i]t is not clear to what extent [exclusions of older workers from the workforce] arise directly from cost factors and to what extent they are the result of plan operations largely unrelated to costs." *Ibid.* The Report found that "cost considerations do not . . . always operate against the older worker," that "[r]elatively few employers, in fact, cited the costs of providing pension and insurance benefits as significant barriers to employment of older persons," and that, "[e]ven in cases where [employers] mentioned pension and insurance [plans as a barrier to employment], cost was not the principal factor involved." *Ibid.*[6] Rather, the Report noted that employers cited limited work expectancy of older workers, morale issues associated with employing persons who would not qualify for employee benefits, and presumed inability to pass physical examinations as the principal employee benefit

[6] The *Research Materials Accompanying The Secretary of Labor's Report* 10 (1965) indicated that, of the employers surveyed, only 6.7% cited the costs and provisions of pension plans as a reason for excluding older workers; only 1.4% cited the costs and provisions of health insurance as a reason; and only 1.2% cited the costs and provisions of life insurance as a factor.

plan-related barriers to the employment of older workers. *Id.* at 33-34.

In 1966, Congress directed the Secretary of Labor to submit specific legislative proposals to implement the recommendations in his Report. *See* 42 U.S.C. § 2000e-14 (1966) (repealed). On January 23, 1967, Secretary of Labor Willard Wirtz submitted a draft "Age Discrimination in Employment Act of 1967" to Congress, stating that the draft bill's "prohibitions are designed to bar arbitrary age discrimination" and that, with respect to so-called "institutional arrangements," the bill authorized research aimed at "reducing barriers to the employment of older workers." *Id.* at 62-63. Section 4(f) of the bill, however, provided that:

> It shall not be unlawful for an employer, employment agency, or labor organization—
>
> • • • •
>
> (2) to separate involuntarily an employee under a retirement policy or system where such policy or system is not merely a subterfuge to evade the purposes of this Act[.]

113 Cong. Rec. 2794 (Feb. 7, 1967), *reprinted in EEOC Legislative History*, at 68.

The Administration bill, which Senator Yarborough introduced on February 3, 1967 (*EEOC Legislative History*, at 66), drew criticism from several legislators during the Senate Hearings. *See Age Discrimination in Employment: Hearings on S.830 and S.788 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 90th Cong., 1st Sess. (March 15-17, 1967) ("*Senate Hearings*"). On the first day of these hearings, Senator Javits protested that:

> the age discrimination law should not be used as the place to fight the pension battle but that we ought to subordinate the importance of adequate pension benefits for older workers in favor of the employment of such older workers and not make the equal treat-

> ment under pension plans a condition of that employment.

Senate Hearings, at 27. Senator Javits announced that he would therefore soon propose an amendment to the Administration bill that would grant employers "a degree of flexibility" with respect to employee benefit plans. *Id.* In his view, a "fairly broad exemption . . . for bona fide retirement and seniority systems [would] facilitate hiring rather than deter it and make it possible for older workers to be employed without the necessity of disrupting those systems." *Id.* at 28.

Senator Smathers, a co-sponsor of the Administration bill, similarly noted a "deficiency" in the bill. *Senate Hearings*, at 29. Reading the Administration bill as requiring employers to provide older workers "the same private pension rights and other fringe benefits" that they provide to younger workers (*id.* at 29), he argued that such a requirement would impose unwarranted costs on employers and actually induce them to discriminate against older workers in the hiring process. *Id.* at 29-30. He therefore proposed an amendment that would have permitted employers to vary coverage under benefit plans "where such variance is necessary to prevent the employer's being required to pay more for coverage of an employee than would be required to provide like coverage for his other employees." *Id.* at 30.[7]

Faced with these criticisms, Secretary Wirtz defended the Administration's bill by emphasizing that its "pro-

[7] Senator Murphy, however, answered that only a small percentage of employers cited the cost of providing pension and insurance benefits as a reason for age discrimination in employment, and that a Bureau of Labor Statistics ("BLS") report showed both that the costs of health and insurance plans do not vary greatly with age and that pension and insurance costs of hiring older workers are often overstated. *Senate Hearings*, at 34. Senator Murphy thus urged the committee to reconsider a bill that he and Senator Javits had introduced in 1966. *Id.* at 32.

hibition is of 'discrimination' in the sense of '*arbitrary* age discrimination' "—a prohibition which he believed that the "obviously broad" terms of § 4(f) reflected. *Senate Hearings*, at 39 (emphasis in original). He stated that § 4(a)'s prohibition on age discrimination "reflects simply the significant fact that what we are doing here is to extend to individuals in situations not covered by collective bargaining agreements or established retirement policies, a degree of protection against discrimination on the basis of age. . . ." *Id.* at 43. While he noted that "[w]hether different eligibility requirements or benefit levels for older workers would constitute arbitrary age discrimination . . . would require determination under the facts of each case" (*id.* at 47), he later added that "the effect of the provision in section 4(f)(2) . . . is to protect the application of almost all plans which I know anything about." *Id.* at 53.

Apparently unpersuaded by Secretary Wirtz's assurances, Senator Javits, the next day on the Senate floor, proposed to replace § 4(f)(2) of the Administration bill with an amendment making it lawful for an employer:

> to observe a seniority system or any retirement, pension, employee benefit, or insurance plan, which is not merely a subterfuge to evade the purposes of this Act, except that no such retirement, pension, employee benefit, or insurance plan shall excuse the failure to hire any individual[.]

113 Cong. Rec. 7077 (March 16, 1967), *reprinted in EEOC Legislative History*, at 72. He did so because, in his view, "the age discrimination law is not the proper place to fight this particular battle." 113 Cong. Rec. 7076 (March 16, 1967), *reprinted in EEOC Legislative History*, at 71. Indeed, he noted that he had "recently introduced a comprehensive bill to deal with this problem." *Id.* Significantly, the bill to which he referred—a precursor to ERISA—defined the phrase "employee benefit plan" to include:

> any plan providing for the payment of any of . . . the following benefits: Medical or hospital care, pension on retirement or death of employees, benefits under a profit-sharing retirement plan, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness benefits, or accident benefits, or pooled vacation, holiday, severance or similar benefits, or defraying the costs of apprenticeship training programs, or, in the case of a fund subject to the restrictions of section 302(c) of the Labor-Management Relations Act, providing any other benefit which may be permitted by subsections 302(c)(5) or 302(c)(6) of that Act[.]

S. 1103, 90th Cong., 1st Sess. 2-3 (1967).[8]

The hearings in the House evidence a clear understanding of the Senate subcommittee's deliberations. *See Age Discrimination in Employment: Hearings on H.R. 3651, H.R. 3768, and H.R. 4221 Before the General Subcommittee on Labor of the House Committee on Education and Labor*, 90th Cong., 1st Sess. (August 1, 2, 3, 15, 16 and 17, 1967) ("*House Hearings*"). Secretary Wirtz admitted to the House subcommittee that the Senate sub-

[8] When the hearings resumed, representatives of the business community joined with Senator Javits in urging the committee to adopt a broader exception for bona fide employee benefit plans than the Administration bill provided. Like Senator Javits, Towers, Perrin, Forster & Crosby, Inc., a leading employee benefits consulting firm, recommended that the Administration bill be amended to exempt "any other bona fide employee benefit plan" from the statute's operation, stating that, "[i]n the absence of such exclusions, . . . hundreds of long established, bona fide pension, group life insurance, medical and other employee benefit plans may be in violation of section 4(a)(1)[.]" *Senate Hearings*, at 280. The American Life Convention, the Health Insurance Association of America, and the Life Insurance Association of America similarly expressed concern that the Administration's bill would disrupt many established insurance, welfare, pension, and other employee benefit plans. *Id.* at 296.

committee had amended § 4(f)(2) of the Administration's bill to clarify its intended scope. *Id.* at 39-40. Numerous witnesses urged the House subcommittee to do the same, reiterating the concerns expressed in the Senate that the Administration's bill would disrupt existing plans and discourage the hiring of older workers. *See id.* at 63, 68-70, 413, 418, 480-481, 495-496, 496-497, 499-500. Thus, the Chairman of the House Subcommittee concluded that, if adopted, the amended § 4(f)(2) would "relieve[] [employers] of the responsibility for the health and welfare and fringe benefits to employees" covered by the bill. *Id.* at 68 (remarks of Rep. Dent).

On October 23, 1967, after the conclusion of these hearings, the House Committee on Education and Labor favorably reported an age discrimination bill (H.R. 13054) to the whole House. *See* H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in EEOC Legislative History*, at 77. The bill so reported included language like that Senator Javits had proposed in the Senate and was essentially identical to that ultimately enacted. *See id.* at 94. In discussing the amended § 4(f)(2), the House Committee report stated:

> It is important to note that exception [2] applies to new and existing employee benefit plans, and to both the establishment and maintenance of such plans. This exception serves to emphasize the primary purpose of the bill—hiring of older workers—by permitting employment without necessarily including such workers in employee benefit plans. The specific exception was an amendment to the original bill, is considered vita[l] to the legislation, and was favorably received by witnesses at the hearings.

H.R. Rep. No. 805, *supra*, *reprinted in EEOC Legislative History*, at 77. Twelve days later, the same bill was reported favorably to the Senate, with a Senate committee report to the same effect. *See* S. Rep. No. 723, 90th Cong., 1st Sess. 4 (November 4, 1967), *reprinted in*

EEOC Legislative History, at 108.[9] Congress then passed the bill, and the President signed it into law.

This legislative history confirms that, in enacting the ADEA, Congress was principally concerned with promoting the employment of older workers. To address this broad concern, Congress expressly declined to adopt either Senator Smathers' proposal to limit the § 4(f)(2) exemption to benefit variances justified by age-related costs or the Administration's proposal to assess benefit variances on a case-by-case basis. Congress opted instead for a broader exemption—one granting employers "a degree of flexibility" with respect to employee benefit plans so as to "facilitate hiring rather than deter it and [to] make it possible for older workers to be employed without the necessity of disrupting those systems." *Senate Hearings*, at 27-28. The court below simply misreads the legislative history in deriving an age-related cost justification limitation from it.

C. An Age-Related Cost Justification Limitation On § 4(f)(2) Does Not Serve The ADEA's Overall Purposes As Well As A Broader Exemption Would

The decision below is statutorily unreasonable for yet another reason. Its narrow interpretation of § 4(f)(2)—limiting that exemption to age-cost justified benefit variances—does not serve the ADEA's purposes as well as a broader exemption would serve them.

1. *The Legislative Purposes*

The ADEA specifically states that its purposes are "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment" (29 U.S.C. § 621(b)). The language and legislative history of the ADEA make clear that Congress had three levels of concerns.

[9] The floor debates in the Senate and House indicate that both bodies understood that, as amended, § 4(f)(2) would broadly exempt ongoing programs for the provision of non-wage benefits. *See, e.g.*, 113 Cong. Rec. 31255 (colloquy between Sen. Javits and Sen. Yarborough), *reprinted in EEOC Legislative History*, at 146; 113 Cong. Rec. 34750 (remarks of Rep. Randall), *reprinted in EEOC Legislative History*, at 161; 113 Cong. Rec. 34745 (remarks of Rep. Smith), *reprinted in EEOC Legislative History*, at 156.

First, Congress intended to promote decision making based on true facts, rather than false stereotypes, about age and its effects. Congress was concerned that employers had misunderstood the relationship between age and employability and, accordingly, had failed to hire or had discharged older persons who were in fact qualified for employment. Congress considered such decision making—based on unfounded assumptions about age—to constitute "arbitrary" age discrimination in employment. The ADEA's principal aim was to eliminate such "arbitrary" age discrimination. *See, e.g., Secretary's Report*, at 6-17, *reprinted in EEOC Legislative History*, at 23-34; 113 Cong. Rec. 7076 (March 16, 1967) (remarks of Sen. Javits), *reprinted in EEOC Legislative History*, at 71; 113 Cong. Rec. 31253-31257 (Nov. 6, 1967) (remarks of Sens. Yarborough and Javits), *reprinted in EEOC Legislative History*, at 144-48.

Second, Congress intended to reduce the "institutional barriers" to the employment of older workers. Congress recognized that employers often denied employment opportunities to older persons because of structural concerns—including concerns related to employee benefit plans. Congress concluded that the employment problems relating to these institutional barriers would be reduced if, among other things, it generally exempted employee benefit plans from the prohibitions of the statute and prohibited their disruption. Section 4(f)(2), as amended, was supposed to accomplish these results. *See, e.g.*, H.R. Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in EEOC Legislative History*, at 77; 113 Cong. Rec. 31255 (Nov. 6, 1967) (remarks of Sens. Javits and Yarborough), *reprinted in EEOC Legislative History*, at 146; 113 Cong.

Rec. 34740 (Dec. 4, 1967) (remarks of Rep. Perkins), *reprinted in EEOC Legislative History*, at 151.[10]

Third, Congress intended to encourage employers, employees, unions and government to work together to develop programs to facilitate the employment of older persons and to meet their special needs. Congress recognized that, in contrast to persons of different races, older and younger workers have different qualifications and face different pre- and post-employment problems. *See generally Secretary's Report*, at 11-17, *reprinted in EEOC Legislative History*, at 28-34. Thus, Congress concluded that employers and employees (or their unions) should have the flexibility to develop solutions to these different problems and to implement programs tailored to the special needs of older and younger workers. Congress intended both § 4(a) and § 4(f) to be interpreted with these concerns in mind. *See* 29 U.S.C. §§ 621(b), 623(a)(1); *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1427-29 (7th Cir. 1986); *Desris v. City of Kenosha*, 687 F.2d 1117, 1121 (7th Cir. 1982), *cert. denied*, 462 U.S. 1120 (1983).

2. *A Broad Exemption Would Better Serve The ADEA's Purposes*

Rejecting the age-related cost justification theory and interpreting § 4(f)(2) to exempt all ongoing administrative programs for the provision of non-wage compensation which are not specifically designed as a "subterfuge" to evade the ADEA would better promote the ADEA's purposes. Specifically, a broad exemption would fully main-

[10] Congress was likewise cognizant of the pernicious effects of disrupting existing benefit programs when it amended § 4(f)(2) of the ADEA in 1978 to prohibit involuntary retirements. Recognizing that some involuntary retirement terms in existing plans had resulted from good faith negotiations between management and unions, Congress chose to delay the amendment's effective date for such terms in collectively bargained plans or agreements. *See EEOC Legislative History*, at 375, 519.

tain the ADEA's prohibition against "arbitrary" age discrimination, would be sensitive to the problem of "institutional barriers" to the employment of older workers, and would provide a flexible vehicle for addressing the impact of age on employment.

First, a broad employee benefit plan exemption maintains in full force the ADEA's prohibition against "arbitrary" discrimination based on unfounded assumptions concerning the effect of age on ability. Such a broad exemption would relate only to the provision of benefits to employees; it would not in any way address or excuse discrimination in wages, terms and conditions of employment, or any other aspect of performance. To the contrary, as discussed earlier, the exemption would not apply to discrimination in compensation not conferred through an employee benefit plan—i.e., wages and other payroll practices—and the "subterfuge" clause would still prevent employers from using an employee benefit plan to circumvent the prohibition against arbitrary age discrimination in employment.

Second, a broad exemption would be fully responsive to the "institutional barriers" that Congress found led employers to deny employment to older workers. To the extent that the cost of benefits is an issue, the exemption would allow employers to make their own judgments—subject, of course, to competitive, collective bargaining, and other legal rules—concerning the costs that are appropriate to bear. To the extent that limited work expectancy is an issue, the exemption would allow employers to make their own judgments—subject to the same pressures stated above—concerning whether and in what circumstances limited work expectancy is a sufficient basis for limiting or adjusting the conditions under which older persons receive the benefits of particular employee benefit plans. And to the extent that employee morale or inability to pass physical examinations are issues, the exemption would leave employers with free-

dom to develop benefit packages that respond to and reduce such problems, subject to the prohibition against using an employee benefit plan as a "subterfuge" for excluding older persons from the workforce.

Finally, a broad exemption would leave employers, employees, and unions free to devise responsive solutions to the special problems arising from the impact of age on employment. It would allow employers to provide different plans, or a combination of plans, for different employee groups, thus recognizing that younger and older workers generally have different benefit needs.[11] The age-related cost justification theory, on the other hand, would prevent employers from creating such responsive benefit arrangements and, concomitantly, would disrupt many of the arrangements that currently exist; *indeed, the majority of retirement plans—like the plan at issue here—apparently limit eligibility for disability benefits to those (younger) employees who are ineligible for regular or early retirement benefits. See Basic Patterns, Collective Bargaining Negotiations and Contracts* (BNA) No. 1068, at 48:2 (May 8, 1986) ("majority [of disability pension clauses] . . . state that an employee must be under normal or early retirement age" to be eligible for disability pension benefits); *see generally Retirement Before Age 65: Trends, Costs, and National Issues*, U.S. General Accounting Office (July 1986), at 29-31. Finally, a broad exemption would ensure that funds expressly designated for older workers are safeguarded and preserved for

[11] Younger workers are typically more concerned with benefits associated with consumption, training, and family; older workers are typically more concerned with savings, security, and continued income flow. *See generally Fundamentals of Employee Benefit Programs, supra*, at 10-11, 273-280. Accordingly, employers have, for example, traditionally provided greater severance benefits to younger workers, and greater pension benefits to older workers, upon termination of employment. *See Basic Patterns, Collective Bargaining Negotiations and Contracts* (BNA) No. 1068, at 48:4 (May 8, 1986) and No. 1067, at 53:4 (April 24, 1986).

their benefit; it would allow and encourage the "integration" practices that ERISA authorizes and that enable employers to pay benefits without draining previously set-aside funds. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 514 (1981).

D. Further Regulation Of Age Discrimination In Employee Benefit Plans Should Come Through Specific Study And Legislative Action From Congress

In suggesting that only a broad exemption—and not the narrow one adopted by the court below—gives full effect to Congress' intent and purposes in enacting § 4(f)(2) of the ADEA in 1967, APPWP does not mean to suggest that the ADEA, as originally enacted, provided a complete solution to the problem of age discrimination in employment. On the contrary, in 1967, Congress recognized that it was taking only a partial step and that further steps might be necessary; indeed, since 1967, Congress has amended the ADEA on several occasions precisely to address particular problems of age discrimination in employment, including problems of age discrimination in employee benefit plans.[12] On each occasion, however, Congress has acted only after careful study and debate, and only after determining which agency of government is best charged with enforcing a new prohibition.

[12] In the 1978 amendment to the ADEA, for example, Congress prohibited employers from using employee benefit plans involuntarily to retire employees because of their age. 29 U.S.C. § 623(f)(2). Furthermore, in the 1982 amendment to the ADEA, Congress required employers with 20 or more employees to offer the same group health plan benefits to employees age 65 and over as are offered to employees under age 65. 29 U.S.C. § 623(g). And, in the 1986 amendment to the ADEA, Congress required employers to continue to accrue pension benefits for employees who continue to work beyond their normal retirement date. 29 U.S.C. § 623(i).

Congress has also made ERISA responsive to similar issues. Thus, for example, that statute prohibits employers from excluding employees from pension plans merely because they have attained a certain age. *See* 29 U.S.C. § 1052(a)(2).

Were Congress now to engage in additional study, it might find that age-related costs are a more significant exclusionary factor in the international economy of the 1980s than they were in the economy of the 1960s, and that the exclusionary factors of concern in the 1960s are less significant today. Congress might also find that, to respond effectively to any changes in the forces resulting in the exclusion of older persons from employment, new age discrimination prohibitions with new exceptions are necessary. But Congress has not made any such studies, engaged in any such debates, or made any such findings. Rather, it has retained the broad exemption that it enacted in § 4(f)(2).

Until Congress chooses to amend the statute, the Court should enforce the § 4(f)(2) exemption in the manner that Congress originally and clearly intended. As Justice Frankfurter aptly stated in another context (*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 609 (1952) (Frankfurter, J., concurring)):

> It is one thing to draw an intention of Congress from general language and to say that Congress would have explicitly written what is inferred, where Congress has not addressed itself to a specific situation. It is quite impossible, however, when Congress did specifically address itself to a problem, as Congress did [here], to . . . find secreted in the interstices of legislation the very grant of power which Congress consciously withheld. To find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between [the Judiciary] and Congress.

CONCLUSION

For the reasons set forth above, the judgment of the court below should be reversed.

Respectfully submitted,

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